

## **EXHIBIT 2**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

- - -

In Re: : Chapter 11  
: :  
: Case No.  
W.R. GRACE & CO., et al, : 01-01139 JKF  
: :  
: (Jointly  
Debtors : Administered)

- - -

Friday, May 15, 2009

- - -

Oral deposition of DAVID T.

AUSTERN, ESQUIRE, taken pursuant to notice, was held at the offices of ORRICK HERRINGTON & SUTCLIFFE, LLP, Columbia Center, 1152 15th Street, N.W., Washington, DC 20005-1706, commencing at 10:07 a.m., on the above date, before Lori A. Zabielski, a Registered Professional Reporter and Notary Public in and for the Commonwealth of Pennsylvania.

- - -

MAGNA LEGAL SERVICES  
Seven Penn Center  
1635 Market Street  
8th Floor  
Philadelphia, Pennsylvania 19103

Page 2

1 APPEARANCES:  
 2  
 3 DRINKER BIDDLE & REATH, LLP  
 BY: MICHAEL F. BROWN, ESQUIRE  
 4 One Logan Square  
 18th & Cherry Streets  
 Philadelphia, Pennsylvania 19103-6996  
 215.988.2988  
 (brownmf@dbr.com)  
 (jeffrey.boerger@dbr.com)  
 7 Representing OneBeacon America Insurance  
 Company, Seaton Insurance Company,  
 Government Employees Insurance Company,  
 Columbia Insurance Company f/k/a Republic  
 Insurance Company  
 10  
 11 ORRICK HERRINGTON & SUTCLIFFE, LLP  
 BY: JONATHAN P. GUY, ESQUIRE  
 12 ROGER FRANKEL, ESQUIRE  
 JOSHUA M. CUTLER, ESQUIRE  
 13 Columbia Center  
 1152 15th Street, N.W.  
 Washington, DC 20005-1706  
 202.339.8427  
 (jguy@orrick.com)  
 Representing Future Claimants  
 Representative  
 17  
 18 CAPLIN & DRYSDALE, CHARTERED  
 BY: JEFFREY A. LIESEMER, ESQUIRE  
 19 One Thomas Circle, NW  
 Suite 1100  
 Washington, DC 20005  
 202.862.5000  
 (jal@capdale.com)  
 Representing Grace, Official Committee of  
 Asbestos Personal Injury Claimants  
 ("ACC")  
 23  
 4

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1 APPEARANCES (continued)  
 2  
 3 VORYS, SATER, SEYMOUR AND PEASE, LLP  
 BY: WILLIAM J. POHLMAN, ESQUIRE\*  
 4 TIFFANY STRELLOW COBB, ESQUIRE\*  
 (\*VIA TELECONFERENCE)  
 5 52 East Gay Street  
 Columbus, Ohio 43215  
 6 614.464.8322  
 (wjpoelman@vorys.com)  
 (tscobb@vorys.com)  
 Representing The Scotts Company, LLC  
 8  
 9  
 10 COHN WHITESELL & GOLDBERG, LLP  
 BY: CHRISTOPHER M. CANDON, ESQUIRE  
 101 Arch Street  
 11 Boston, Massachusetts 02110  
 617.951.2505  
 (candon@cwg11.com)  
 Representing the Libby Claimants  
 13  
 14  
 15 SPEIGHTS & RUNYAN  
 BY: DANIEL H. SPEIGHTS, ESQUIRE\*  
 (\*VIA TELECONFERENCE)  
 16 200 Jackson Avenue East  
 P.O. Box 685  
 Hampton, South Carolina 29924  
 803.943.4444  
 (dspeights@speightsrunyan.com)  
 Representing Anderson Memorial Hospital  
 19  
 20  
 21 TUCKER ARENSBERG, P.C.  
 BY: MICHAEL A. SHINER, ESQUIRE\*  
 (\*VIA TELECONFERENCE)  
 22 1500 One PPG Place  
 Pittsburgh, Pennsylvania 15222  
 412.594.5586  
 (mshiner@tuckerlaw.com)  
 Representing Certain London Market  
 24

Page 3

1 APPEARANCES (continued)  
 2  
 3 KIRKLAND & ELLIS, LLP  
 BY: THEODORE L. FREEDMAN, ESQUIRE\*  
 (\*VIA TELECONFERENCE)  
 Citigroup Center  
 5 153 East 53rd Street  
 New York, New York 10022-4611  
 6 212.446.4800  
 (theodore.freedman@kirkland.com)  
 7 Representing the Debtors  
 8  
 9 THE LAW OFFICES OF JANET S. BAER, P.C.  
 BY: JANET S. BAER, ESQUIRE  
 10 70 West Madison Street  
 Suite 2100  
 11 Chicago, Illinois 60602  
 312.641.2162  
 12 Representing the Debtors  
 13  
 14 SIMPSON THACHER & BARTLETT, LLP  
 BY: ELISA ALCABES, ESQUIRE  
 15 KAREN E. ABRAVANEL, ESQUIRE\*  
 (\*VIA TELECONFERENCE)  
 16 425 Lexington Avenue  
 New York, New York 10017-3954  
 17 212.455.3133  
 (ealcabes@stblaw.com)  
 (kabravanel@stblaw.com)  
 18 Representing Travelers Casualty and  
 Surety Company  
 19  
 20  
 21  
 22  
 23  
 24

Page 5

1 APPEARANCES (continued)  
 2  
 3 BILZIN SUMBERG BAENA PRICE & AXELROD, LLP  
 BY: MATTHEW I. KRAMER, ESQUIRE\*  
 (\*VIA TELECONFERENCE)  
 4 200 South Biscayne Boulevard  
 Suite 2500  
 Miami, Florida 33131-5340  
 6 305.450.7246  
 (mkramer@bilzin.com)  
 Representing Property Damage Committee  
 7  
 8  
 9 STROOCK & STROOCK & LAVAN, LLP  
 BY: DANIEL J. HARRIS, ESQUIRE\*  
 10 (\*VIA TELECONFERENCE)  
 11 180 Maiden Lane  
 New York, New York 10038-4982  
 212.806.5400  
 12 (djharris@stroock.com)  
 Representing Official Committee of  
 Unsecured Creditors  
 13  
 14  
 15 CROWELL & MORING, LLP  
 BY: MARK PLEVIN, ESQUIRE  
 16 NOAH S. BLOOMBERG, ESQUIRE  
 1001 Pennsylvania Avenue NW  
 17 Washington, DC 20004-2595  
 202.624.2913  
 (mplevin@crowell.com)  
 (nbloomberg@crowell.com)  
 18 Representing Fireman's Fund Insurance  
 (Surety Bond)  
 20  
 21  
 22 STEVENS & LEE, P.C.  
 BY: JOHN D. DEMMY, ESQUIRE  
 1818 Market Street, 29th Floor  
 23 Philadelphia, Pennsylvania 19103-1702  
 215.751.2885  
 (jdd@stevenslee.com)  
 24

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1	APPEARANCES (continued)	1	
2		2	- - -
3	ALAN B. RICH LAW OFFICES	3	I N D E X
4	BY: ALAN B. RICH, ESQUIRE	4	
5	Elm Place, Suite 4620	5	
6	1401 Elm Street	6	Testimony of:
7	Dallas, Texas 75202	7	DAVID T. AUSTERN, ESQUIRE
8	214.744.5100	8	
9	(arich@alanrichlaw.com)	9	By Mr. Brown Page 12, 242
10	Representing Property Damage FCR	10	By Ms. Alcabels Page 95
11		11	By Mr. Candon Page 123, 251
12	CONNOLLY BOVE LODGE & HUTZ, LLP	12	By Mr. Demmy Page 164
13	BY: JEFFREY C. WISLER, ESQUIRE	13	By Mr. Cohn Page 173
14	The Nemours Building	14	By Mr. Plevin Page 192
15	1007 North Orange Street	15	By Ms. Cobb Page 207
16	P.O. Box 2207	16	By Ms. Casey Page 219
17	Wilmington, Delaware 19899	17	By Mr. Mangan Page 221
18	302.88.6528	18	By Mr. Speights Page 222
19	(jwisler@cblh.com)	19	
20	Representing Maryland Casualty	20	
21		21	
22	ECKERT SEAMANS CHERIN & MELLOTT, LLC	22	
23	BY: EDWARD J. LONGOSZ, II, ESQUIRE	23	
24	1747 Pennsylvania Avenue, NW	24	
	12th Floor		
	Washington, DC 20006		
	202.659.6619		
	(elongosz@eckertseamans.com)		
	Representing Maryland Casualty and Zurich		
	COZEN O'CONNOR		
	BY: JACOB C. COHN, ESQUIRE		
	1900 Market Street		
	Philadelphia, Pennsylvania 19103-3508		
	215.665.2147		
	(jcohn@cozen.com)		
	Representing Federal Insurance Company		

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1	APPEARANCES (continued)	1	
2		2	- - -
3	CUYLER BURK, P.C.	3	E X H I B I T S
4	BY: STEFANO V. CALOGERO, ESQUIRE	4	
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22	BY: KEVIN J. MANGAN, ESQUIRE*	22	Notice of Deposition of
23	(*VIA TELECONFERENCE)	23	David Austern 95
24	222 Delaware Avenue	24	Austern-8
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	(kmangan@wcsr.com)		Austern-9
	Representing State of Montana		Notice of Deposition of
			David T. Austern 124
	PEPPER HAMILTON, LLP		
	BY: LINDA J. CASEY, ESQUIRE*		
	(*VIA TELECONFERENCE)		
	3000 Two Logan Square		
	Philadelphia, Pennsylvania 19103		
	215.981.4000		
	(caseyl@pepperlaw.com)		
	Representing BNSF Railway Company		

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PROCEEDINGS  
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MR. GUY: We will follow the federal rules.  
-----  
DAVID T. AUSTERN, ESQUIRE, after having been first duly sworn, was examined and testified as follows:

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EXAMINATION  
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BY MR. BROWN:  
Q. Good morning, Mr. Austern.  
My name is Michael Brown. I represent OneBeacon American Insurance Company, Seaton Insurance Company, GEICO, and Republic Insurance Company.  
Could you state your full name for the record, please?  
A. David Thomas Austern.  
Q. Have you ever been deposed before?

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DEPOSITION SUPPORT INDEX  
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NONE

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NONE

Area(s) Marked Confidential:  
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NONE

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A. Yes.  
Q. How many times?  
A. Somewhere between 25 and 30 times.  
Q. So it's fair to say that you are familiar with the protocol for a deposition then?  
A. I am.  
Q. Okay. Can you give me a summary of your professional background?  
A. I was an assistant district attorney in the New York County District Attorney's Office for four years; I was an assistant United States attorney in the United States Attorney's Office in Washington, D.C. for four years; I was a law professor for two years; I was in the private practice of law for something like 12 years; and I've been general counsel of the Manville Personal Injury Settlement Trust, and I have had some other asbestos matters for the last 21 and a half years. That doesn't add up to 45, and it should, but...

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1 Q. Those are estimates, I take  
2 it?

3 A. Those are estimates, yes.

4 Q. What did you do in  
5 preparation for today's deposition?

6 A. I reviewed some documents,  
7 and I spoke to counsel.

8 Q. What documents did you  
9 review?

10 A. I also reviewed some  
11 transcripts.

12 I reviewed the Personal  
13 Injury Trust Agreement; the Trust  
14 Distribution Process -- the Personal  
15 Injury Trust Distribution Process; the  
16 Transfer Agreement; the Cooperation  
17 Agreement; I reviewed Ms. Biggs' latest  
18 estimation report; Dr. Peterson's latest  
19 report; Dr. Florence's latest report;  
20 Dr. Whitehouse's -- one of  
21 Dr. Whitehouse's reports -- I am sorry --  
22 two of Dr. Whitehouse's reports; the  
23 rebuttal to those reports from Dr. Welsh  
1 and Dr. Freedman; the objections filed by

1 thing in preparation of the deposition.  
2 I listened to parts of, albeit not all,  
3 of the Lockwood deposition.

4 Q. Did you meet with counsel in  
5 preparation for the deposition?

6 A. Yes.

7 Q. When?

8 A. Last Friday and yesterday.

9 Q. And for how long last

10 Friday? What period of time did you meet  
11 with counsel?

12 A. I confess I don't remember,  
13 but it was several hours.

14 Q. And the more recent meeting?

15 A. I would say three hours.

16 Q. Was it just counsel for the  
17 Future Claimants' Representative or were  
18 other Plan proponent counsel present?

19 A. No. There were no other  
20 Plan proponent counsel.

21 Q. In reviewing Mr. Lockwood's  
22 deposition testimony, was there anything  
23 in his transcript with which you  
24 disagreed?

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Page 17

1 the Libby claimants and by one or more  
2 insurance companies, and I am not sure I  
3 know which ones; my prior deposition in  
4 this case; my prior deposition in the  
5 Combustion Engineering case; my testimony  
6 in the Combustion Engineering case. I  
7 may have left something out, but I think  
8 those are most of the documents I  
9 reviewed.

10 Q. Okay. And you also  
11 mentioned that you had reviewed some  
12 transcripts?

13 A. Those were the depositions  
14 and trial testimony -- oh, excuse me.  
15 Yes. I reviewed Mr. Lockwood's  
16 deposition.

17 Q. Did you actually review the  
18 Amended Plan of Reorganization?

19 A. Yes -- and excuse me -- and  
20 the Disclosure Statement.

21 Q. And over what period of time  
22 did you review all these materials in  
23 preparation for your deposition?

24 A. Two weeks. I did one other

1 A. I don't remember -- nothing  
2 occurs to me, although if you showed me a  
3 question and answer, I might say I  
4 disagreed. But I don't recall anything.

5 Q. Okay. When you listened in  
6 on a portion of the deposition, was there  
7 anything that you heard by way of an  
8 answer by Mr. Lockwood that struck you as  
9 inaccurate?

10 A. Not that I recall.

11 Q. Okay. Now, you mentioned  
12 that you had reviewed the Disclosure  
13 Statement, the Plan, the PI Trust  
14 Agreement I assume you were referring to,  
15 the PI Trust Distribution Procedures, the  
16 Transfer Agreement, and the Cooperation  
17 Agreement?

18 A. Yes.

19 Q. Do you understand all of  
20 those documents?

21 A. No.

22 Q. Are there particular  
23 documents that you understand better than  
24 others?

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Page 20

1 A. Yes.

2 Q. Which ones?

3 A. The Trust Distribution  
4 Process.

5 Q. By that, you mean the  
6 Asbestos PI Trust Distribution  
7 Procedures?

8 A. Yes, yes.

9 Q. Okay.

10 A. I will refer to it as the  
11 TDP, most likely.

12 Q. We will finish the  
13 deposition a lot sooner if you do that.

14 A. And there were some sections  
15 in some of the other documents I thought  
16 I understood and some sections I thought  
17 I did not.

18 Q. Okay. How about the Trust  
19 Agreement?

20 A. I believe I understood most  
21 of that.

22 Q. Okay. You were appointed by  
23 the bankruptcy court as the, quote, legal  
4 representative, close quote, under

1 FCR? I understand that you were approved  
2 by the bankruptcy court, but how were you  
3 presented, if you will, for that role?

4 A. Understanding I was not in  
5 the case at the time, I can only tell you  
6 what documents I have looked at appear to  
7 say.

8 Q. Okay.

9 A. The Debtor presented to the  
10 court a motion of seeking an appointment  
11 of an FCR, provided the court with three  
12 names and an untitled fourth name -- I  
13 will explain that in a moment. The three  
14 names proposed were me and two other  
15 people, and then a statement that the  
16 Property Damage Representatives didn't  
17 want any of the three names mentioned by  
18 the Debtor and wanted some unnamed fourth  
19 person. So there were four, if you will,  
20 potential choices presented to the  
21 bankruptcy court.

22 Q. Who were the other two named  
23 individuals?

24 A. Professor Eric Green and

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Page 21

1 Section 524(g) of the bankruptcy code,  
2 correct?

3 A. Correct.

4 Q. When did that occur?

5 A. Just about this time of year  
6 five years ago.

7 Q. Okay. So in 2004?

8 A. Yes.

9 Q. And, as I understand it,  
10 under the Plan your title is the asbestos  
11 PI FCR, correct?

12 A. Yes.

13 Q. And the FCR is for Future  
14 Claimants' Representative?

15 A. Yes.

16 Q. You will understand if I  
17 refer to you as the FCR in the  
18 deposition?

19 A. I will understand what the  
20 reference is.

21 Q. Okay. You are a  
22 co-proponent of the Plan, correct?

23 A. Yes.

24 Q. How did you come to be the

1 Dean Trafelet.

2 Q. I gather from your answer  
3 that at the time this occurred, it was  
4 contemplated that there would be a single  
5 asbestos trust that would handle both  
6 personal injury claims and property  
7 damage claims?

8 A. I don't know.

9 Q. Do you have any idea how the  
10 Debtors came up with the three names that  
11 they did?

12 A. I know what they said in  
13 their pleading. They said they had  
14 discussed this matter with, well,  
15 obviously, the Property Damage Trust  
16 Representatives that I mentioned, and  
17 they had discussed it with one or more  
18 Creditors Committees and the Asbestos  
19 Claimants Committee.

20 Q. And then did the bankruptcy  
21 court select you from the list of  
22 contenders for the position?

23 A. Well, I have left out a  
24 pleading.

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1           **Q. Okay.**

2           A. The Asbestos Claimants  
3           Committee filed a motion, I guess, in  
4           response to the Debtors motion in which  
5           they -- I should back up a step.

6           The Debtors motion had a  
7           chart on it, as I recall, which showed  
8           who opposed various of the names  
9           mentioned and who was in favor of various  
10          of the names mentioned, looking at the  
11          committees. And one of the things that  
12          was said was that the ACC opposed me and  
13          wanted Dean Trafelet. The ACC responded  
14          to that, I believe, saying they did not  
15          oppose me, but they wanted Dean Trafelet  
16          rather than me.

17          **Q. Okay. And did judge  
18          Fitzgerald then make a decision based  
19          upon the pleadings you just described?**

20          A. I don't know what drove her  
21          decision, but she made a decision and she  
22          selected me.

23          **Q. Okay. Now, did you have the  
24          title FCR with respect to other asbestos**

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1           **trusts?**

2           A. Yes.

3           **Q. Which ones? Actually, just  
4           for purposes of that question, I want to  
5           focus on trusts that are obviously up and  
6           running as opposed to ones that may be in  
7           the works.**

8           A. One other trust, the  
9           Combustion Engineering Trust.

10          **Q. And then you mentioned  
11          earlier that you are the general counsel  
12          for the Manville Trust?**

13          A. Yes.

14          **Q. Is your role as the general  
15          counsel for the Manville Trust akin to  
16          your role as the FCR for the Combustion  
17          Engineering Trust?**

18          A. No.

19          **Q. Okay. Can you describe the  
20          differences in your roles?**

21          A. Well, first of all, the  
22          Manville Trust has a Futures Claims  
23          Representative.

24          **Q. Okay.**

Page 24

1           A. So I certainly don't have  
2           that role. I advise the trustees -- I am  
3           the legal advisor to the trustees and  
4           sometimes trust staff.

5           **Q. And what is your role as the  
6           FCR for the Combustion Engineering Trust?**

7           A. I represent future  
8           claimants.

9           **Q. Are you familiar with a term  
10          "Trust Advisory Committee"?**

11          A. Yes.

12          **Q. Is there a Trust Advisory  
13          Committee for the Combustion Engineering  
14          Trust?**

15          A. Yes.

16          **Q. And who are its current  
17          members?**

18          A. Mr. Cooney, Mr. Weitz,  
19          Mr. Kazan, and there is somebody else.  
20          And I am not sure who it is.

21          **Q. With respect to the  
22          Combustion Engineering Trust, did you  
23          have the role of future claimants -- let  
24          me back up. Strike that.**

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1           **Did you have the role of  
2           legal representative, as that term is  
3           used in Section 524(g) of the bankruptcy  
4           code?**

5           A. I believe that was what I  
6           was, yes.

7           **Q. Okay. And were you a  
8           co-proponent of the CE Trust --**

9           A. Yes.

10          **Q. The CE Plan?**

11          A. Yes.

12          **Q. Putting aside confirmed  
13          plans and trusts that are up and running,  
14          are you the designated Future Claimants'  
15          Representative in connection with any  
16          pending asbestos bankruptcy cases other  
17          than the Grace case?**

18          A. No.

19          **Q. Are you familiar with the  
20          statutory requirements for a Section  
21          524(g) trust?**

22          A. I am generally familiar. I  
23          am not sure I can recall each and every  
24          one right at the moment.

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1           **Q.** Do you have any  
2 understanding at all of what a demand is?

3           A. In bankruptcy law, no.

4           **Q.** Who do you understand to be  
5 your constituency?

6           A. Future claimants.

7           **Q.** Do you have an understanding  
8 that future claimants are the holders of  
9 future demands?

10          A. I don't know.

11          **Q.** Do you have an understanding  
12 as to whether the Debtors face the  
13 prospect of any future asbestos PD  
14 demands or asbestos PD claims?

15          A. I believe there are  
16 scenarios in which they do.

17          **Q.** Could you describe them?

18          A. No, but I believe that there  
19 are property damage claims that -- that  
20 the Debtor is responsible  
21 post-confirmation for certain property  
22 damage claims.

23          **Q.** And that those property  
1 damage claims would fit within what you

1 today, for which you -- strike that.  
2 Are there particular  
3 provisions in the Plan that you don't  
4 understand?

5           A. Yes.

6           **Q.** Are there any that stick out  
7 in your mind in that regard?

8           A. Can I look at the Plan for a  
9 moment?

10          **Q.** Sure.

11          A. By way of example, 7.15 of  
12 the document.

13          **Q.** That's one that you do not  
14 understand?

15          A. Well, it's one I have  
16 trouble trying to understand.

17          **Q.** You are in good company.

18          A. There are other sections of  
19 the Plan and other documents I reviewed  
20 that address insurance issues, which I  
21 have trouble understanding and rely on  
22 counsel to explain to me.

23          **Q.** Well, as would have it, 7.15  
24 is an area that I wanted to question you

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1 understand to be a future property damage  
2 claim as opposed to a current property  
3 damage claim?

4           A. I am not sure.

5           **Q.** All right.

6           MR. BROWN: We will mark  
7 this Austern-3.

8           (Austern-3 marked for  
9 identification at this time.)

10 BY MR. BROWN:

11          **Q.** Mr. Austern, you have before  
12 you a document that we have marked  
13 Austern-3.

14          My first question is, can  
15 you identify it?

16          A. It's the first Amended Joint  
17 Plan of Reorganization.

18          **Q.** And this is one of the  
19 documents you indicated previously that  
20 you reviewed in preparation for this  
deposition, correct?

21          A. Yes.

22          **Q.** Are there particular  
23 provisions in the Plan, as you sit here

1 about. So why don't we turn to that  
2 section.

3           A. (Witness complies with  
4 request.)

5           **Q.** And why don't you take a  
6 moment to review it. It's not terribly  
7 long.

8           MR. GUY: Is there any  
9 particular section, Michael?

10          MR. BROWN: Well, I have  
11 questions about a few sections, so  
12 it might be easiest if he reads  
13 the whole thing.

14          THE WITNESS: Okay. I have  
15 reviewed it.

16 BY MR. BROWN:

17          **Q.** Okay. Recognizing that you  
18 don't understand it fully, do you have an  
19 idea of what its intended purpose is?

20          A. Its intended purpose, as I  
21 understand it, is to create insurance  
22 neutrality.

23          **Q.** And what do you understand  
24 insurance neutrality to be?

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1 A. That the Plan does not  
 2 interfere with the rights of the  
 3 insurance companies.

4 Q. Okay. Are there any  
 5 exceptions to that broad statement, as  
 6 you understand Section 7.15?

7 MR. COHN: You might want to  
 8 rephrase that because you just  
 9 changed from his understanding of  
 10 insurance neutrality in the broad  
 11 concept to a provision that very  
 12 clearly is not what it was  
 13 announced to be.

14 MR. BROWN: Can you read the  
 15 last question?

16 (The reporter read from the  
 17 record as requested.)

18 BY MR. BROWN:

19 Q. You understand Section 7.15  
 20 to be intended to preserve the insurers'  
 21 rights; is that a fair statement?

22 A. Yes.

23 Q. Okay. Is it your belief  
 1 that that's what it accomplishes?

1 MR. GUY: Objection.  
 2 MR. LIESEMER: Object to the  
 3 form of the question.

4 MR. GUY: It calls for a  
 5 legal conclusion. The witness is  
 6 a fact witness.

7 MS. BAER: Same objection.

8 THE WITNESS: I am not  
 9 positive I know what you mean by  
 10 preemptory. You sort of focused  
 11 on my problem with 7.15. I don't  
 12 know how you read the successive  
 13 paragraphs as impacting on each  
 14 other.

15 BY MR. BROWN:

16 Q. Do you believe Section 7.15  
 17 to be unclear?

18 A. To me.

19 MR. GUY: Objection.

20 BY MR. BROWN:

21 Q. Okay. Well, let's explore  
 22 that a little bit.

23 Let's look at Section

24 7.15(b), and you will see that there is a

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1 A. I don't know.

2 (There was a discussion held  
 3 off the record at this time.)

4 BY MR. BROWN:

5 Q. Mr. Austern, are you  
 6 familiar with the UNR decision in the  
 7 Seventh Circuit, the citation to which is  
 8 942 F.2d 1101?

9 A. I am familiar with the UNR  
 10 Trust. I am not familiar with the  
 11 decision.

12 Q. Are you familiar with what  
 13 happened in the trial court in the  
 14 Fuller-Austin coverage case?

15 MR. GUY: Objection, vague.

16 THE WITNESS: No.

17 BY MR. BROWN:

18 Q. You said you just read  
 19 Section 7.15. Let's focus on (a).

20 Is your understanding that  
 21 (a) is a preemptory provision with  
 22 respect to the Plan, Plan documents, and  
 23 Confirmation Order except as specifically  
 24 set forth in Section 7.15?

1 reference in subsection (b) to, quote,  
 2 the beneficiaries of the Asbestos PI  
 3 Trust?

4 Do you see that?

5 A. Yes.

6 Q. Do you have any  
 7 understanding as to what that means?

8 A. It means what it states, the  
 9 beneficiaries of the Personal Injury  
 10 Trust.

11 Q. And who are they?

12 A. Well, there are personal  
 13 injury claimants obviously, and there  
 14 are, under certain circumstances,  
 15 indirect personal injury claimants.

16 Q. Okay. And who do you  
 17 understand to be within the definition of  
 18 indirect PI Trust claimants?

19 A. Entities that can bring  
 20 claims as indirect claimants on the  
 21 grounds that they have paid dollars that  
 22 the Personal Injury Trust should  
 23 reimburse them for.

24 Q. Okay. Are you familiar at

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1 all with any of the Debtors' pre-petition  
 2 settlements with insurance companies?

3 A. I have seen a list, and  
 4 that's the extent of my knowledge.

5 Q. Are you aware that at least  
 6 certain of those insurers have  
 7 contractual indemnity provisions against  
 8 the Debtors in those settlement  
 9 agreements?

10 A. Can you explain to me what  
 11 you mean by contractual?

12 Q. Sure. I will represent to  
 13 you that there are settlement agreements  
 14 that are pre-petition settlement  
 15 agreements in which the insurer paid a  
 16 sum of money to the Debtors, and in  
 17 exchange for paying that money, the  
 18 Debtors agreed to indemnify the insurer  
 19 in the event that claims were asserted  
 20 against the policy after the settlement  
 21 by other parties.

22 A. Third party claimants?

23 Q. Third parties.

4 Do you understand the term

1 BY MR. BROWN:

2 Q. Okay. Let me parse that  
 3 out. Do you understand certain of the  
 4 Debtors' insurance companies to have  
 5 indirect asbestos PI claims?

6 A. They could. They could have  
 7 the right to file them, yes.

8 Q. Okay. And do you understand  
 9 those insurers to fit within the phrase  
 10 in (b), the beneficiaries of the Asbestos  
 11 PI Trust? In other words, are the  
 12 insurers that have the contractual  
 13 indemnity claims against the Debtors,  
 14 quote, beneficiaries of the Asbestos PI  
 15 Trust, as that term is used in 7.15(b)?

16 MR. LIESEMER: Object to the  
 17 form of the question.

18 MR. GUY: Objection, asked  
 19 and answered, compound.

20 MS. BAER: Same objection.

21 MR. GUY: You may answer.

22 THE WITNESS: As far as I  
 23 know, they could be under certain  
 24 circumstances.

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1 "indirect PI Trust claims" to include the  
 2 insurers insofar as they have the type of  
 3 contractual indemnity claim that I just  
 4 described?

5 MR. LIESEMER: Object to the  
 6 form of the question.

7 MR. GUY: Same objection.

8 THE WITNESS: Mr. Brown, I  
 9 understand that all asbestos  
 10 personal injury insurance has been  
 11 channelled to the Asbestos  
 12 Personal Injury Trust. And there  
 13 are settled insurance companies  
 14 that -- how would I describe it --  
 15 their obligations have been  
 16 settled with the Debtor; there are  
 17 unsettled ones; and then there are  
 18 those that have coverage in place  
 19 agreements or reimbursement  
 20 agreements.

21 I don't know where your  
 22 question fits into my  
 23 understanding of those buckets of  
 24 insurance entities.

1 BY MR. BROWN:

2 Q. All right. Then I would now  
 3 like you to compare the language in (a)  
 4 and the language in (b) based on the  
 5 assumption that they are.

6 MR. GUY: Now I am confused.

7 MR. BROWN: Anyone who reads  
 8 this provision is confused.

9 MR. GUY: I am confused.

10 It's talking --

11 THE WITNESS: You are asking  
 12 me to compare (a) to (b) or (b) to  
 13 (a)?

14 MR. GUY: For what purpose?

15 BY MR. BROWN:

16 Q. If the insurer that I just  
 17 described is a beneficiary of the  
 18 Asbestos PI Trust, then, according to  
 19 (b), it is bound by the Plan, the Plan  
 20 documents, and the Confirmation Order,  
 21 correct?

22 A. That's what (b) says, yes.

23 Q. So does (b) then supersede  
 24 subsection (a)?

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1 A. I don't know.

2 Q. Let's go to a defined term  
3 in the Plan which appears on page 6,  
4 number 16, quote, asbestos insurer  
5 coverage defenses. Take a moment to  
6 review that provision.

7 MR. GUY: So that I don't  
8 have to repeat it throughout, I am  
9 going to enter a standing  
10 objection. The witness is here  
11 not as a 30(b)(6) witness on  
12 insurer issues, and the Plan says  
13 what it says.

14 MR. BROWN: I understand.

15 MR. COHN: Can you keep your  
16 voice up, Tom?

17 MR. GUY: We will go off the  
18 record.

19 (There was a discussion held  
20 off the record at this time.)

21 BY MR. BROWN:

22 Q. Have you had a chance to  
23 review the definition of asbestos insurer  
4 coverage defenses?

1 Q. Okay. My question is, do  
2 you have an understanding as to whether  
3 the language in 7.15(a) supersedes the  
4 language in 11.9?

5 A. I don't know.

6 Q. Do you know whether it's  
7 intended to?

8 A. No.

9 Q. Reading both of those  
10 provisions, do you understand whether it  
11 does?

12 MR. GUY: Objection, calls  
13 for a legal conclusion.

14 MR. BROWN: It just calls  
15 for his understanding.

16 THE WITNESS: Mr. Brown, I  
17 must confess to you when I read  
18 11.9 both the first time and the  
19 second time, what I concentrated  
20 on was on the fact that I had  
21 exculpation, and I didn't  
22 concentrate very much more.

23 BY MR. BROWN:

24 Q. So you have been exculpated

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1 A. Yes.

2 Q. Do you understand it?

3 A. No.

4 Q. Fair enough. You are not  
5 alone.

6 Let's get back to 7.15.

7 A. Can you give me the page  
8 again?

9 Q. I am sorry. It's page 87.  
10 Actually, what I would like to do is I  
11 want to do a comparison. Can you also  
12 look at Section 11.9? You might want to  
13 take a moment to read 11.9.

14 A. Can you give me a page  
15 number?

16 Q. Yes. Page 115, Section 11.9  
17 entitled Exculpation.

18 A. Okay.

19 Q. If you keep that page handy  
20 and go back and look at Section 7.15, I  
21 will represent to you, feel free to look  
22 yourself, that there is no specific  
23 reference in 7.15 to Section 11.9.

24 A. I believe that's correct.

1 if the Plan is confirmed?

2 A. Yes.

3 Q. Let's just use that as an  
4 example, not to pick on you, but since  
5 you understand at least that much in  
6 11.9.

7 Insofar as an insurer had a  
8 claim against you, would you still be  
9 exculpated in light of Section 7.15 as  
10 you understand it?

11 MR. LIESEMER: Object to the  
12 form of the question.

13 MR. GUY: Objection, calls  
14 for a legal conclusion.

15 THE WITNESS: The first part  
16 of the answer is that in the Trust  
17 Agreement, I also have what is not  
18 labeled as exculpation but  
19 indemnification rights, not  
20 including gross negligence.

21 The answer is I don't know  
22 the answer to that question.

23 BY MR. BROWN:

24 Q. Does that concern you?

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1 A. Does a possible conflict of  
 2 7.15 to 11.9 concern me?

3 Q. Well, yes.

4 A. No.

5 Q. Okay. Would you go back to  
 6 Section 7.7 of the Plan?

7 A. Did you say 7.7?

8 Q. Yes. 7.7 entitled

9 Conditions to Occurrence of the  
 10 Confirmation Date.

11 MR. GUY: What page is that?

12 MR. BROWN: I am sorry. It  
 13 starts on page 69, and there are a  
 14 lot of conditions. So it runs to  
 15 page 81.

16 THE WITNESS: Okay.

17 BY MR. BROWN:

18 Q. You are free to look at  
 19 that, if you want, but I understand you  
 20 have already reviewed the Plan.

21 A. Yes.

22 Q. My question is, do you have  
 23 an understanding as to whether Section  
 4 7.15 entitled Insurance Neutrality

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1 preempts Section 7.7 insofar as the  
 2 Debtors's insurers are concerned?

3 MR. GUY: Objection, calls  
 4 for a legal conclusion.

5 THE WITNESS: I don't know.

6 BY MR. BROWN:

7 Q. Okay. If you look at  
 8 Section 7.8, which begins on page 81,  
 9 that one is entitled Conditions to  
 10 Occurrence of the Effective Date.

11 If I asked you the same  
 12 question, would your answer be the same  
 13 with respect to Section 7.8?

14 A. Can I look at 7.8 for a  
 15 moment?

16 Q. Sure.

17 A. I am sorry. Could you  
 18 repeat the question?

19 Q. Let me see if I can rephrase  
 20 it. My question is whether the  
 21 preemptory language that appears in  
 22 Section 7.15(a) preempts the conditions  
 23 set forth in Section 7.8, as understand  
 24 it?

1 MR. GUY: Objection.

2 MR. LIESEMER: I join in  
 3 that objection.

4 MR. GUY: It calls for a  
 5 legal conclusion.

6 THE WITNESS: I don't know.

7 BY MR. BROWN:

8 Q. Okay. Can you now look at  
 9 7.15(h)?

10 A. Did you say (e)?

11 Q. (H). It appears on page 88.

12 A. Yes.

13 Q. Do you understand 7.15(h) to  
 14 bind all of the Debtors' insurers to all  
 15 of the releases and injunctions set forth  
 16 in the Plan?

17 MR. GUY: Objection, calls  
 18 for a legal conclusion.

19 THE WITNESS: I don't know.

20 BY MR. BROWN:

21 Q. Let's go to page 97 of the  
 22 Plan, Section 8.5 entitled Successor  
 23 Claims Injunction.

24 MR. GUY: When you get to a

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1 point for a break, can we take  
 2 one?

3 MR. BROWN: Why don't we do  
 4 that right now.

5 (There was a break from  
 6 11:03 a.m. to 11:13 a.m.)

7 (The reporter read from the  
 8 record as requested.)

9 BY MR. BROWN:

10 Q. Mr. Austern, I don't know if  
 11 you have had a chance to review that  
 12 section during the break, but if not, can  
 13 you take a look at it?

14 A. Yes, I have reviewed this.

15 Q. Do you have an understanding  
 16 as to the purpose of the successor claims  
 17 injunction?

18 MR. LIESEMER: Object to the  
 19 form of the question.

20 THE WITNESS: Well, as its  
 21 name implies, it is intended to  
 22 enjoin certain conduct. Beyond  
 23 that, I, of course, was not part  
 24 of this case when either the

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1 Sealed Air or the Fresenius  
 2 actions were commenced and  
 3 concluded and settled.

4 BY MR. BROWN:

5 Q. Do you understand the  
 6 Fresenius indemnified parties and the  
 7 Sealed Air indemnified parties to be the  
 8 beneficiaries of the successor claims  
 9 injunction?

10 A. I believe they are.

11 Q. Okay. The successor claims  
 12 injunction is a 105 injunction, correct?

13 A. Correct. It's not a 524(g)  
 14 injunction.

15 Q. I gather from your answer  
 16 that you understand the difference  
 17 between a Section 105 injunction and a  
 18 Section 524(g) injunction?

19 A. To the extent that Manville  
 20 had only a Section 105 injunction, yes.

21 Q. Okay. Do you have an  
 22 understanding as to whether the successor  
 23 claims injunction enjoins any claims that  
 4 are asbestos-related claims?

1 Q. The successor claims  
 2 injunction by its terms cannot be lifted?

3 A. It cannot, as I understand  
 4 it.

5 Q. If a claim fits within the  
 6 definition of the successor claim, as  
 7 that term is defined in the Plan, do you  
 8 understand the successor claims  
 9 injunction to enjoin that claim?

10 MR. LIESEMER: Object to the  
 11 form of the question.

12 MR. GUY: Same objection.

13 MS. BAER: Same objection.

14 THE WITNESS: I don't know.

15 BY MR. BROWN:

16 Q. Let's turn back for a moment  
 17 to asbestos PI channelling injunction,  
 18 page 90, Section 8.2.

19 A. Okay.

20 Q. Do you understand the  
 21 asbestos PI channelling injunction to be  
 22 purely a 524(g) injunction?

23 MR. GUY: Objection.

24 THE WITNESS: I don't know.

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1 MR. GUY: Objection, calls  
 2 for a legal conclusion.

3 THE WITNESS: Do you mean  
 4 asbestos personal injury, or no?

5 BY MR. BROWN:

6 Q. Could be, or any other type  
 7 of asbestos-related claim.

8 A. I am not sure.

9 Q. Do you understand there to  
 10 be a problem with using a Section 105  
 11 injunction to enjoin asbestos-related  
 12 claims?

13 MR. GUY: Objection, vague  
 14 as to problem.

15 MR. LIESEMER: I join in the  
 16 objection.

17 THE WITNESS: There are  
 18 certain 105 injunctions that can  
 19 be lifted. I assume you cannot do  
 20 that with a 524(g) injunction as  
 21 it is inexorably intertwined with  
 22 the Plan itself. I don't know of  
 23 any other distinctions.

24 BY MR. BROWN:

1 I don't know if it is or not.

2 BY MR. BROWN:

3 Q. All right. Mr. Austern, I  
 4 want to shift gears here and turn back to  
 5 the Asbestos PI Trust Agreement, which we  
 6 marked as Austern-2. And I would like to  
 7 direct your attention to Section 6.1.  
 8 And you are going to want a page.

9 A. It's 34.

10 Q. In 6.1, the second sentence  
 11 says, "He shall serve in a fiduciary  
 12 capacity, representing the interests of  
 13 the holders of future PI Trust Claims for  
 14 the purpose of protecting the rights of  
 15 such persons."

16 Do you see that?

17 A. Yes.

18 Q. And the "he" there is you,  
 19 correct?

20 A. Yes.

21 Q. What do you understand your  
 22 obligations to be to the holders of  
 23 future PI Trust claims?

24 A. I represent them, and, as to

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1           **Q.** You will agree with me that  
 2 Section 2.2(f) sets forth a number of  
 3 different items for which the trustees  
 4 need the consent of the TAC and the  
 5 Future Claimants' Representative,  
 6 correct?

7           A. Yes.

8           **Q.** It goes on from Romanette 1  
 9 to Romanette 15, correct?

10          A. Yes.

11          **Q.** Why is there a need to have  
 12 the consent of the Future Claimants'  
 13 Representative and the TAC on these  
 14 particular items rather than simply  
 15 consultation?

16          A. My answer is the same, and I  
 17 will speak forgetting the TAC, as the  
 18 Future Claimants' Representative, I want  
 19 the right to under certain circumstances  
 20 not agree to a decision by the trustees  
 21 and have that be the end of the decision.

22          **Q.** Well, it's not actually the  
 23 end of the decision, is it?

4           A. No. There are ways of

1 list of them.

2           A. Dean Trafelet, Lewis  
 3 Sifford, and Harry Huge.

4           **Q.** And do you know each of  
 5 those gentlemen?

6           A. Well, in the case of  
 7 Mr. Huge and Mr. Trafelet, I do know  
 8 them. In the case of Mr. Sifford, I have  
 9 met him on a number of occasions.

10          **Q.** Okay. What is the  
 11 professional background of Mr. Huge?

12          A. Let's see. I first met him  
 13 about 40 years ago at the Justice  
 14 Department. I am sorry. He is a lawyer.  
 15 He has been with the government. He has  
 16 been in private practice. Do you want  
 17 more?

18          **Q.** Does he have experience with  
 19 asbestos trusts?

20          A. Yes, he does.

21          **Q.** What is that experience?

22          A. He is a trustee of Armstrong  
 23 and I believe a trustee of OCF.

24          **Q.** How long has he had the role

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1 resolving that difference.

2           **Q.** And what are those?

3           A. Well, I may confuse this  
 4 with the Manville Trust, but you can  
 5 seek, shall we say, guidance from the  
 6 bankruptcy court.

7           **Q.** By that, you mean a ruling?

8           A. Yes, yes.

9           **Q.** If your consent has been  
 10 unreasonably withheld in the views of the  
 11 trustees?

12          A. That's correct.

13          **Q.** Is there anything in Section  
 14 524(g) to your knowledge that requires a  
 15 Trust, an asbestos Trust, to have a  
 16 consultation and consent provisions that  
 17 are set forth in this Trust Agreement?

18          A. I do not know of anything in  
 19 524(g) like that.

20          **Q.** Do you know who the  
 21 designated trustees are for the Asbestos  
 22 PI Trust?

23          A. Yes.

24          **Q.** Okay. Who are they? Or

1 of trustee in Armstrong?

2           A. I met with him shortly after  
 3 he was appointed, and I should be able to  
 4 remember that. I think four or five  
 5 years.

6           **Q.** And how about as a trustee  
 7 in OCF?

8           A. I don't know.

9           **Q.** Okay. Why don't you tell me  
 10 what the professional background of  
 11 Mr. Sifford is?

12          A. I know him less well.

13          Mr. Sifford is a practicing lawyer in a  
 14 law firm, and he is an Armstrong trustee,  
 15 I believe. And that's, I believe, the  
 16 first time I met him, and thus I looked  
 17 him up. And according to

18          Martindale-Hubbell, he does both personal  
 19 injury plaintiff's work and personal  
 20 injury defense work. I am getting close  
 21 to exhausting my knowledge of him.

22          **Q.** Okay. Is the personal  
 23 injury work that he does, both defense  
 24 and plaintiff's work, asbestos-related?

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1 A. It is not as far as I know.  
 2 Q. Do you know what it does  
 3 relate to?

4 A. No.

5 Q. Okay. Do you know how long  
 6 he has been a trustee of the Armstrong  
 7 Trust?

8 A. The same period of time  
 9 Mr. Huge has been, but I don't remember  
 10 when that started.

11 Q. I thought you said that one  
 12 was four to five years ago?

13 A. Four to five years ago. I  
 14 don't remember exactly.

15 Q. All right. And what is the  
 16 professional background of Mr. Trafelet?

17 A. Before I get to that, let me  
 18 explain. Armstrong was confirmed, and  
 19 for a long time, there was no activity  
 20 for reasons that allude me. So I can't  
 21 remember exactly when I got involved in  
 22 talking to those people.

23 Q. Okay.

4 A. Mr. Trafelet is a lawyer who

1 Q. And would I be correct that  
 2 he's been that for four or five years?

3 A. Yes.

4 Q. Let's go to Section 4.9 of  
 5 the Trust Agreement. Take a moment to  
 6 read that, if you would.

7 A. Okay.

8 Q. The second-to-the-last  
 9 sentence in Section 4.9 says, "No Trustee  
 10 shall act as an attorney for any person  
 11 who holds an asbestos claim."

12 Do you see that?

13 A. Yes.

14 Q. What's the reason for that?

15 A. To avoid conflicts.

16 Q. What type of conflicts?

17 A. Well, you are a trustee of a  
 18 Plan paying somebody; you shouldn't be  
 19 paying your client.

20 Q. Is there any other reason?

21 A. Not that I know of.

22 MR. BROWN: Mark this as  
 23 Austern-4.

24 (Austern-4 marked for

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1 was a judge of, I believe, the Circuit  
 2 Court in Cook County, Illinois for a  
 3 period of time, and he is an asbestos  
 4 trustee of -- it seems to me, he is the  
 5 sole trustee of the Loomis Trust and also  
 6 a Futures Rep, I believe, at Armstrong.

7 Q. Okay. And he was one of the  
 8 gentlemen that you mentioned that, if I  
 9 remember correctly, the Asbestos PI  
 10 Committee, otherwise known as the ACC,  
 11 wanted to have the role that you have?

12 A. Yes.

13 Q. Do you know how long he has  
 14 been a trustee of the Loomis Trust?

15 A. Since it was confirmed. And  
 16 this I really should know, but I think it  
 17 was confirmed about three years ago.

18 Q. Okay. And do you know  
 19 whether he was the FCR in Armstrong  
 20 before a plan was confirmed?

21 A. I do not know.

22 Q. Okay. But he is the FCR for  
 23 the Trust?

24 A. Yes, I believe he is.

1 identification at this time.)

2 BY MR. BROWN:

3 Q. Exhibit-4, Mr. Austern, is  
 4 Exhibit 6 to the Exhibit Book. My first  
 5 question for you is, can you identify it?

6 A. It's the Asbestos Insurance  
 7 Transfer Agreement, which is part of the  
 8 Plan, as you point out.

9 Q. And I believe you said this  
 10 is one of the documents that you had  
 11 reviewed; am I correct?

12 A. Yes.

13 Q. Do you understand this  
 14 agreement?

15 A. Not in its entirety.

16 Q. Okay. Are there particular  
 17 provisions of this agreement that you do  
 18 not understand that you could direct my  
 19 attention to?

20 A. Well, I would have to look  
 21 at it for a moment. I am not sure I  
 22 understand all of the representations and  
 23 warranties and some of the terms in them.  
 24 There are two schedules, if I remember

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1 correctly, here.

2 Q. I think there is three.

3 A. All right. I was never  
4 quite sure I understood the constant or  
5 individual differences between the  
6 Schedules 2 and 3.

7 Q. Okay. Other than what you  
8 what you just described, do you generally  
9 have a good handle on the Asbestos  
10 Insurance Transfer Agreement?

11 A. I wouldn't describe it as a  
12 good handle, but I recognize some of the  
13 paragraphs.

14 Q. All right. Let me direct  
15 your attention -- let's look at Section 1  
16 on page 2, and you should probably look  
17 at subsection (a). And then (d) is the  
18 one I have the question on.

19 A. Yes.

20 Q. In (d), it says, "The  
21 Transfer is not an assignment of any  
22 insurance policy."

23 Do you see that?

1 A. Yes.

1 A. In general.

2 Q. Could you describe for me  
3 what some of those duties are?

4 A. Well, you have to report  
5 claims.

6 Q. Okay.

7 A. And you have to, under  
8 certain policies, confer with the  
9 insurance company about what you are  
10 settling and why and for how much. And,  
11 forgetting individual policies for a  
12 minute, under corporate policies, there  
13 are certain audit rights that sometimes  
14 exist as a condition of payment to the  
15 insured.

16 Q. Are you familiar with the  
17 requirement in some policies that the  
18 insurer have a right to defend the  
19 insured?

20 MR. LIESEMER: Object to  
21 form.

22 THE WITNESS: As well as an  
23 obligation.

24 BY MR. BROWN:

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1 Q. What is it?

2 A. It's an assignment of a --  
3 do you mean what is the Transfer  
4 Agreement?

5 Q. Yes. What is the transfer,  
6 which is a defined term?

7 A. Being transferred?

8 Q. Yes.

9 A. The proceeds.

10 Q. Anything else?

11 A. Well, I confess as the  
12 Futures Claims Rep, I never got past the  
13 proceeds because the money was what  
14 interested me.

15 Q. Okay. Have you reviewed any  
16 of the Debtors' insurance policies?

17 A. No.

18 Q. Have you ever reviewed a  
19 general liability insurance policy?

20 A. Yes.

21 Q. Do you have a general  
22 understanding as to the duties and  
23 obligations of an insured under general  
24 liability insurance policy?

1 Q. Okay. And are you aware  
2 that in some policies there is a right on  
3 the part of the insurer to associate in  
4 the defense of the insured?

5 MR. LIESEMER: Object to  
6 form.

7 THE WITNESS: I am not sure  
8 I am familiar with that.

9 BY MR. BROWN:

10 Q. Okay. Well, you indicated  
11 that the one thing you knew that was  
12 being transferred was proceeds.

13 Are you aware of anything  
14 else that's being transferred pursuant to  
15 the Asbestos Insurance Transfer  
16 Agreement?

17 A. I am not sure what you mean  
18 by anything else, other than the money.

19 Q. That's it?

20 A. Well, other things may be  
21 being transferred, but I can't think of  
22 anything right now.

23 Q. Okay. Do you have an  
24 understanding as to whether the Asbestos

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1 PI Trust will become the insured under  
 2 the policies that are listed on Schedule  
 3 1 to this agreement?

4 MR. GUY: Objection, calls  
 5 for a legal conclusion.

6 THE WITNESS: Mr. Brown, I  
 7 don't know. I certainly hope so.

8 BY MR. BROWN:

9 Q. Do you have an understanding  
 10 as to what, if anything, happens to the  
 11 obligations of the insured under the  
 12 policies on Schedule 1 if the Plan is  
 13 confirmed?

14 MR. GUY: Objection to form.

15 MR. LIESEMER: I join in  
 16 that objection.

17 THE WITNESS: Let me make  
 18 sure I understand the question.  
 19 What happens to the obligations of  
 20 -- if the policy was still in the  
 21 hands of the Debtor, what would  
 22 happen to the obligations of the  
 23 Debtor and the rights of the  
 1 insurance company?

1 that's responsive to your  
 2 question.

3 BY MR. BROWN:

4 Q. What is it going to do?

5 What is the Trust going to do?

6 MS. BAER: Objection to  
 7 form.

8 MR. LIESEMER: I join.

9 THE WITNESS: It's going to  
 10 settle claims pursuant to the  
 11 Trust Distribution Process.

12 BY MR. BROWN:

13 Q. Okay. Will the Debtors'  
 14 insurers have any role in the handling  
 15 defense or settlement of any claim  
 16 submitted to the Asbestos PI Trust?

17 MR. GUY: Objection.

18 MR. LIESEMER: Objection to  
 19 form.

20 MR. GUY: Objection, calls  
 21 for speculation.

22 MS. BAER: Objection, same.

23 THE WITNESS: Let me address  
 24 audit rights. In my copious free

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1 BY MR. BROWN:

2 Q. I am not sure I understood  
 3 the qualification. Let me try it a  
 4 little differently.

5 To the extent that the  
 6 Debtor has duties and obligations under  
 7 one or more of its insurance policies, if  
 8 this Plan is confirmed, what happens to  
 9 those duties and obligations, as you  
 10 understand it?

11 MR. LIESEMER: Object to the  
 12 form.

13 MS. BAER: I join in the  
 14 objection.

15 THE WITNESS: The Plan is  
 16 going to be administered pursuant  
 17 to the Trust Distribution Process  
 18 as it affects personal injury  
 19 asbestos claims.

20 To that extent, the personal  
 21 injury Trust, as far as I know, is  
 22 not going to call up each and  
 23 every insurance company and say  
 "Can I settle this claim?" I hope

1 time, Mr. Brown, I am the claims  
 2 administrator of the Dow Corning  
 3 Trust -- that is not an asbestos  
 4 Trust -- and this issue has arisen  
 5 in that context. And I dare say  
 6 it may arise in the context of the  
 7 W.R. Grace Trust.

8 If insurance companies  
 9 object to paying because they do  
 10 not have audit rights or because  
 11 of any other input into the Trust,  
 12 I dare say they are going to bring  
 13 that to the attention of the  
 14 trustees. And either that will be  
 15 worked out between the trustees  
 16 and the insurance company or  
 17 some -- I don't like this phrase  
 18 because I am not sure I know what  
 19 it means -- but some coverage  
 20 court will have to determine the  
 21 rights of the insurance company as  
 22 a function of the trustees'  
 23 duties.

24 MR. BROWN: Could you read

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1 back the question?

2 (The reporter read from the  
3 record as requested.)

4 BY MR. BROWN:

5 Q. Other than what you just  
6 described, will the Debtors' insurers  
7 have any role in the handling defense or  
8 settlement of asbestos PI claims into the  
9 Trust?

10 MR. GUY: Same objection as  
11 to speculation.

12 MR. LIESEMER: Same  
13 objection.

14 MS. BAER: Same.

15 THE WITNESS: I don't know  
16 what the trustees are going to do  
17 about that, so I don't know.

18 MR. BROWN: Why don't we  
19 take five minutes.

20 (There was a break from  
21 11:46 a.m. to 11:57 a.m.)

22 MR. BROWN: Let's go ahead  
23 and mark this document.

24 (Austern-5 marked for

1 A. No.

2 Q. Is there a reason for that?

3 A. I don't know.

4 MR. BROWN: All right.

5 Let's mark this.

6 (Austern-6 marked for  
7 identification at this time.)

8 BY MR. BROWN:

9 Q. Mr. Austern, you have  
10 another document in front of you now  
11 marked Austern-6. It's Exhibit 10 to the  
12 Exhibit Book.

13 Can you identify this  
14 development?

15 A. It is the Cooperation  
16 Agreement between the Debtor and others.

17 Q. And, again, this is one of  
18 the documents that you reviewed in  
19 preparation for today's deposition,  
20 correct?

21 A. I don't remember if I  
22 specifically did it for that purpose, but  
23 I have certainly reviewed it in the past.

24 Q. Okay. What is the purpose

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1 identification at this time.)

2 BY MR. BROWN:

3 Q. Mr. Austern, you have been  
4 handed what's been marked Austern-5.  
5 It's Exhibit 4 to the Exhibit Book.

6 Can you identify it?

7 A. This is the TDP for the  
8 Plan.

9 Q. I am correct, am I not, that  
10 this is one of the documents that you  
11 reviewed in preparation for today's  
12 deposition?

13 A. Yes.

14 Q. Are you aware of any  
15 provision in the TDP or the Trust  
16 Agreement that we spoke about earlier  
17 that provides for any role for the  
18 Debtors' insurers in the handling,  
19 defense, or settlement of any asbestos  
20 claims submitted to the Trust?

21 A. No.

22 Q. Are you aware of any other  
23 Plan document that provides for such a  
24 role?

1 of this document?

2 A. I am not sure I know the  
3 legal purpose. It creates certain rights  
4 and obligations between and among some of  
5 the parties.

6 Q. Okay. And who are those  
7 parties?

8 A. Well, the Debtor, the  
9 Reorganized Debtor, and the Trust. I  
10 mean the personal injury Trust.

11 Q. The Debtors' insurers are  
12 not a party to this agreement, correct?

13 A. No.

14 Q. We talked a little bit  
15 earlier about general liability insurance  
16 policies.

17 Are you generally familiar  
18 with what's called duty to cooperate in a  
19 general liability policy on the part of  
20 the insured?

21 A. Generally.

22 MR. LIESEMER: Objection to  
23 form.

24 BY MR. BROWN:

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1           **Q.** If the Joint Plan is  
 2 confirmed and if there is a duty to  
 3 cooperate under a given policy, what  
 4 happens to that duty?

5           MR. GUY: Objection, calls  
 6 for speculation.

7           THE WITNESS: Well, the  
 8 proceeds of the policy have been  
 9 transferred to the Personal Injury  
 10 Trust. I don't know what happens  
 11 to the duty of the Trust standing  
 12 in the shoes of the Debtor.

13 BY MR. BROWN:

14           **Q.** So you don't know whether  
 15 the Trust steps into the shoes of the  
 16 Debtor with respect to the Debtors'  
 17 obligations under the policy; is that  
 18 what your telling me?

19           A. I don't know.

20           MR. BROWN: I think I am  
 21 going to pass you to the next  
 22 questioner, Mr. Austern. Thank  
 23 you. Subject to maybe a few  
 1 follow-ups, I am finished.

1           **Exhibit-4, which is the Transfer**  
 2 **Agreement, and look at Schedules 2 and 3?**  
 3           A. (Witness complies with  
 4 request.)

5           **Q.** Correct me if I'm wrong, I  
 6 believe you said you weren't sure what  
 7 the difference was between Schedules 2  
 8 and 3?

9           A. In the sense that I don't  
 10 know why there are two schedules. I  
 11 mean, clearly different people are listed  
 12 under certain schedules.

13           **Q.** Do you have an understanding  
 14 that the types of settlement agreements  
 15 are different on Schedule 2 and Schedule  
 16 3?

17           A. I assume that's why there  
 18 are two schedules.

19           **Q.** You previously also  
 20 mentioned that you understood that there  
 21 were three types of insurance agreements;  
 22 there were settlements -- there were  
 23 settled insurers, there were unsettled  
 24 insurers, and there were insurers are

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1           - - -  
 2           EXAMINATION  
 3           - - -

4 BY MS. ALCABES:

5           **Q.** Hello, Mr. Austern. My name  
 6 is Elisa Alcabes from Simpson Thacher &  
 7 Bartlett. I am counsel for Travelers  
 8 Casualty and Surety Company.

9           Travelers served a Notice of  
 10 Deposition on you. I am just going to  
 11 have that marked.

12           (Austern-7 marked for  
 13 identification at this time.)

14 BY MS. ALCABES:

15           **Q.** Do you recall seeing this  
 16 notice?

17           A. I saw many notices. I don't  
 18 know if I saw this one.

19           **Q.** Okay. And are you familiar  
 20 at all with any of the agreements between  
 21 Travelers and W.R. Grace that were  
 22 entered into pre-petition?

23           A. No.

24           **Q.** Can you turn to Austern

1           coverage in place agreements or  
 2 reimbursement agreements? I am not sure  
 3 I said that exactly right.

4           I believe you said you  
 5 understood there were three types of  
 6 settled insurers -- three types of  
 7 insurers. I have got it right now.  
 8 Three types of insurers.

9           There are unsettled  
 10 insurers, fully settled insurers, and  
 11 insurers with coverage in place or  
 12 reimbursement agreements; is that right?

13           A. That is my understanding.

14           **Q.** And that's how you  
 15 understand this Plan to operate; is that  
 16 correct?

17           A. Yes.

18           **Q.** Okay. So do you understand  
 19 that Schedule 2 lists the fully settled  
 20 insurers, the insurers that have fully  
 21 settled agreements?

22           A. What do you mean by fully?

23           **Q.** Fully paid settlement  
 24 agreements.

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1 MR. PLEVIN: Let me  
 2 reiterate my view that Mr. Austern  
 3 is a party to the case, and -- all  
 4 right. Let me see if I can get to  
 5 the point of demonstrating the  
 6 relevance in this fashion.

7 MR. GUY: I will tell you  
 8 what. If I could talk to my  
 9 client for two seconds, I think we  
 10 can cut through this.

11 MR. PLEVIN: Sure.

12 (There was a discussion held  
 13 off the record at this time.)

14 MR. GUY: You may answer the  
 15 question as long as there is an  
 16 express understanding that you are  
 17 not going to argue that there is  
 18 any kind of waiver of privilege in  
 19 the answer.

20 MR. PLEVIN: That's  
 21 acceptable.

22 THE WITNESS: I believe  
 23 there is a question on the floor.

1 BY MR. PLEVIN:

1 the proof of claim filed by Fireman's  
 2 Fund that I described a moment ago?

3 MS. BAER: Objection as to  
 4 form.

5 MR. GUY: Objection.  
 6 You may answer.

7 THE WITNESS: No.

8 BY MR. PLEVIN:

9 Q. Do you have an  
 10 understanding, Mr. Austern, as to what  
 11 the rights of the Edwards plaintiffs  
 12 would be under the Plan in the TDPs in  
 13 the event that the judgment that they  
 14 currently hold were to be reversed by  
 15 either the Texas Court of Appeals or the  
 16 Texas Supreme Court?

17 MS. BAER: Objection, form.

18 MR. LIESEMER: Same  
 19 objection.

20 MR. PLEVIN: What was the  
 21 objection?

22 MS. BAER: Form.

23 THE WITNESS: You are asking  
 24 me, do I have a view of what they

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1 Q. Yes. And I believe the  
 2 question on the floor is whether you have  
 3 an opinion as to the likelihood of  
 4 success on appeal or the strength of  
 5 Grace's position on appeal in the Edwards  
 6 matter?

7 A. No.

8 MS. BAER: Objection to the  
 9 extent you are requesting  
 10 communications among the  
 11 co-proponents and therefore the  
 12 codefendants.

13 MR. LIESEMER: And I join  
 14 the objection.

15 MR. PLEVIN: And I will  
 16 reiterate that I was not asking  
 17 him about any communications. I  
 18 was asking him about his own view.

19 BY MR. PLEVIN:

20 Q. And your answer,  
 21 Mr. Austern?

22 A. I have no view.

23 Q. Do you have a view as to the  
 24 proper classification under the Plan of

1 would do?

2 BY MR. PLEVIN:

3 Q. What their rights would be  
 4 under the Plan.

5 A. I assume their rights would  
 6 be to file a personal injury claim with  
 7 the Trust.

8 Q. As opposed to taking their  
 9 case back to a trial court, if it were  
 10 remanded for a new trial and retrying the  
 11 case in the trial court?

12 MS. BAER: Objection. Now  
 13 you are asking for a legal  
 14 conclusion.

15 MR. LIESEMER: Objection,  
 16 speculation, hypothetical.

17 THE WITNESS: I don't know.  
 18 My understanding of the Plan is  
 19 they got to file a Personal Injury  
 20 Trust claim.

21 BY MR. PLEVIN:

22 Q. If there is a reversal?

23 A. Yes.

24 Q. Do you understand,

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1   **Mr. Austern, the concept of set-off in  
2   bankruptcy?**

3   A. I understand set-off  
4   generally as a proposition. I am not  
5   sure I would apply it -- I don't know  
6   that I know enough bankruptcy law to  
7   apply it to bankruptcy.

8   **Q. Okay. What is your  
9   understanding of the concept of set-off?**

10   A. Well, if I owe you \$10,000  
11   and I have to pay Mr. Guy because you owe  
12   him some money, I can set-off from what I  
13   paid Mr. Guy what I owe you.

14   MR. PLEVIN: Can you read  
15   that answer back?

16   (The reporter read from the  
17   record as requested.)

18   BY MR. PLEVIN:

19   **Q. Are you aware, Mr. Austern,  
20   that Grace has made claims for insurance  
21   coverage against Fireman's Fund under  
22   liability insurance policies issued by  
23   Fireman's Fund?**

1   A. Yes.

1   **Q. And that the insurance  
2   coverage claims Grace has made at least  
3   include, if not -- they are not limited  
4   to claims for coverage of asbestos  
5   personal injury claims?**

6   A. I am sorry. Can you say  
7   that again?

8   **Q. I got a little tied up  
9   there.**

10   **Grace is seeking coverage  
11   from Fireman's Fund under the Fireman's  
12   Fund insurance coverage policies for  
13   asbestos personal injury claims asserted  
14   against Grace, correct?**

15   A. Yes.

16   **Q. Do you have a view as to  
17   whether in the event that Fireman's Fund  
18   is obligated to pay insurance coverage to  
19   Grace, Fireman's Fund would be able to  
20   reduce that obligation by any amount that  
21   Grace is obligated to pay under the  
22   indemnity agreement?**

23   MR. GUY: Objection. I  
24   don't see how he can answer that

1   question without getting into a  
2   legal analysis. He is here as a  
3   fact witness.

4   But, again, let me talk to  
5   my client, and I think we can  
6   resolve it with the answer.

7   MS. BAER: We join in the  
8   objection.

9   (There was a discussion held  
10   off the record at this time.)

11   **THE WITNESS: I have no  
12   view.**

13   **BY MR. PLEVIN:**

14   **Q. Do you have a concern that  
15   if the Edwards appeal were to be --  
16   withdrawn.**

17   **Do you have a concern that  
18   if the Edwards judgment were to be  
19   affirmed on appeal and Fireman's Fund  
20   paid money to Edwards and then made a  
21   claim against Grace for the amount paid,  
22   that that would in some way reduce the  
23   amount of money coming into the Trust  
24   from the Fireman's Fund insurance policy?**

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1   **Q. And that the insurance  
2   coverage claims Grace has made at least  
3   include, if not -- they are not limited  
4   to claims for coverage of asbestos  
5   personal injury claims?**

6   A. I am sorry. Can you say  
7   that again?

8   **Q. I got a little tied up  
9   there.**

10   **Grace is seeking coverage  
11   from Fireman's Fund under the Fireman's  
12   Fund insurance coverage policies for  
13   asbestos personal injury claims asserted  
14   against Grace, correct?**

15   A. Yes.

16   **Q. Do you have a view as to  
17   whether in the event that Fireman's Fund  
18   is obligated to pay insurance coverage to  
19   Grace, Fireman's Fund would be able to  
20   reduce that obligation by any amount that  
21   Grace is obligated to pay under the  
22   indemnity agreement?**

23   MR. GUY: Objection. I  
24   don't see how he can answer that

1   **MR. LIESEMER: Objection to  
2   the form.**

3   **MS. BAER: Objection.**

4   **MR. GUY: Objection to form.**

5   **THE WITNESS: Mr. Plevin, I  
6   have any concern that the activity  
7   might reduce the amount of  
8   insurance coming into the Grace  
9   Trust. And I understand this is  
10   approximately \$6 million. And if  
11   Fireman's Fund were to reduce its  
12   payment or be entitled to reduce  
13   its payment under the Fireman's  
14   Fund policy for asbestos personal  
15   injury to the Trust and it would  
16   reduce it by \$6 million, yes, I  
17   have a concern.**

18   **BY MR. PLEVIN:**

19   **Q. And I am sure this has been  
20   established on the record long before I  
21   came here, but let me just ask this  
22   question for foundational purposes.**

23   **You are an attorney,  
24   Mr. Austern?**

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1 A. Yes.

2 Q. And you have practiced law  
3 for how many years?

4 A. 45.

5 MR. PLEVIN: Thank you. I  
6 have no further questions.

7 MR. CALOGERO: I have no  
8 questions.

9 MR. WISLER: Maryland  
10 Casualty has no questions.

11 MR. GUY: Are there any  
12 insurers on the phone who have  
13 questions?

14 Scotts? BNSF? Do you have  
15 any questions?

16 MS. COBB: Yes. This is  
17 Tiffany Cobb on behalf of The  
18 Scotts Company, LLC, with Vorys,  
19 Sater, Seymour and Pease. Can you  
20 hear me?

21 MR. GUY: Yes. Hi, Tiffany.  
22 - - -  
23 EXAMINATION  
24 - - -

1 who specifically do you view as your  
2 punitive clients?

3 A. Future claimants.

4 Q. Okay. And in your capacity  
5 as the FCR then, do you owe a fiduciary  
6 duty to asbestos PI claimants as defined  
7 in the Plan who hold future demands  
8 against any entity that is addressed in  
9 the definition of an asbestos PI  
10 claimant?

11 A. Can you repeat the last part  
12 of that. Against whom?

13 Q. Sure. Against any entity  
14 that is addressed in the definition of  
15 asbestos PI claimant?

16 A. Yes.

17 Q. In your capacity as the FCR,  
18 do you owe a fiduciary duty to indirect  
19 PI Trust claimants who hold future  
20 demands against the Debtors?

21 A. Yes.

22 Q. In your capacity as the FCR,  
23 do you owe a fiduciary duty to  
24 insurance-related claimants who hold

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1 BY MS. COBB:

2 Q. Mr. Austern, in your  
3 capacity as the Asbestos PI Future  
4 Claimants' Representative, what fiduciary  
5 duties do you owe?

6 MR. GUY: Tiffany, we  
7 covered that earlier in the  
8 deposition. Were you listening  
9 in?

10 MS. COBB: I was.

11 MR. GUY: I just don't want  
12 to have a lot of duplicity in the  
13 questioning. I will allow this  
14 one.

15 THE WITNESS: I have a  
16 fiduciary duty to future  
17 claimants.

18 BY MS. COBB:

19 Q. But what are the duties?

20 A. Essentially to make sure  
21 there is sufficient funds, that when they  
22 file claims they will be treated the same  
23 or similarly to present claimants.

24 Q. In your capacity as the FCR,

1 future demands against any settled  
2 insurance company?

3 A. I think I would have to go  
4 back and look at the definition of those  
5 people.

6 Q. Okay. Then let's do that.  
7 If you would, please, look at Exhibit-5  
8 which is the TDP, and if you would please  
9 look at Section 5.12.

10 A. I am looking at it, but give  
11 me a moment.

12 Q. Sure.

13 A. Okay. What was the  
14 question?

15 Q. In your capacity as the FCR,  
16 do you owe a fiduciary duty to  
17 insurance-related claimants who hold  
18 future demands against any settled  
19 insurance companies?

20 A. I don't know. I would have  
21 to think about that. I realize they  
22 could be indirect claimants, at least I  
23 think they could be indirect claimants.  
24 So I would have to think about that. I

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1 mean, I didn't mean this instant.

2 **Q. Mr. Austern, if an**  
 3 **insurance-related claimant is not an**  
 4 **indirect PI claimant, what other type of**  
 5 **claimant as defined in the Plan would you**  
 6 **think they would be?**

7 A. That's exactly what my  
 8 problem is. I am trying to see if they  
 9 would be an indirect claimant, and,  
 10 therefore, I don't know what other type  
 11 of claim they would have in the context  
 12 of this Plan. And that's my confusion.  
 13 But if they are, then it seems to me I  
 14 owe a fiduciary duty to them.

15 **Q. And if an insurance-related**  
 16 **claimant is an asbestos PI claimant, as**  
 17 **opposed to an indirect PI Trust claimant,**  
 18 **would your answer be the same?**

19 MR. GUY: Objection,  
 20 hypothetical and speculation.

21 THE WITNESS: The insurance  
 22 company as a PI claimant?

23 BY MS. COBB:

24 **Q. As an asbestos PI claimant.**

1 the question.

2 MS. BAER: I join in the  
 3 objection.

4 THE WITNESS: I don't know.  
 5 The Debtor is certainly -- it says  
 6 for which the Debtor has  
 7 liability. If that's the same,  
 8 then yes.

9 BY MS. COBB:

10 **Q. Would you agree that in**  
 11 **state court action, there are asbestos PI**  
 12 **claimants who have asserted bodily injury**  
 13 **asbestos-related claims relating to Grace**  
 14 **vermiculite against one or more indirect**  
 15 **PI claimants?**

16 MS. BAER: Objection,  
 17 foundation.

18 MR. LIESEMER: Same  
 19 objection.

20 MR. GUY: Objection.

21 THE WITNESS: I am familiar  
 22 that the Libby claimants have  
 23 filed such claims.

24 BY MS. COBB:

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1 A. I must confess that I  
 2 haven't thought about that because I  
 3 don't know how it could happen.

4 **Q. Would you agree that in**  
 5 **Exhibit-3, the definition of an**  
 6 **asbestos -- pardon me -- strike that.**

7 **Would you agree that in**  
 8 **Exhibit-3 the definition of an indirect**  
 9 **PI Trust claimant is defined to be a**  
 10 **claim or demand against the Debtors?**

11 MR. GUY: Standing objection  
 12 that the Plan says what it says.

13 THE WITNESS: I see a  
 14 definition of an indirect PI Trust  
 15 claim. I don't see a claimant.  
 16 Is that what you are were  
 17 referring to?

18 BY MS. COBB:

19 **Q. Pardon me. Yes. The**  
 20 **definition of indirect PI Trust claim is**  
 21 **defined as a claim or demand against**  
 22 **Debtors?**

23 MR. LIESEMER: If that's a  
 24 question, I object to the form of

1 **Q. Are you aware of any other**  
 2 **asbestos PI claimants who have asserted**  
 3 **asbestos-related bodily injury claims**  
 4 **relating to Grace vermiculite against one**  
 5 **or more indirect PI claimants?**

6 MS. BAER: Objection,  
 7 foundation.

8 MR. GUY: Objection, form.  
 9 Tiffany, I am not sure. I think  
 10 that's one is vague.

11 THE WITNESS: I am not.

12 BY MS. COBB:

13 **Q. With respect to the Libby**  
 14 **claimants' actions of which you are aware**  
 15 **in the state court system, would you**  
 16 **agree that those asbestos PI claimants**  
 17 **and the indirect PI claimants against**  
 18 **whom they have asserted their claims are**  
 19 **adversaries in those actions?**

20 MS. BAER: Objection,  
 21 foundation.

22 MR. GUY: Objection.

23 THE WITNESS: If one is a  
 24 plaintiff and one is a defendant,